IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 15, 2009 Session

THE IJ COMPANY, INC., ET AL. v. COLLIER DEVELOPMENT COMPANY, INC. d/b/a ROCKY RIVER BREWERY & GRILL

Appeal from the Circuit Court for Knox County
No. 2-195-03 Harold Wimberly, Jr., Judge

No. E2009-00020-COA-R3-CV - FILED NOVEMBER 13, 2009

The IJ Company, Inc.[1] ("IJ") sued Collier Development Company, Inc. ("Collier Development") d/b/a Rocky River Brewery & Grill ("Rocky River") seeking, among other things, payment from Collier Development for food service products IJ had supplied to Rocky River. After a bench trial, the Trial Court dismissed the case finding and holding, *inter alia*, that IJ had not met its burden of proving that it had a contract with Collier Development. IJ appeals to this Court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

J. Myers Morton and George W. Morton, Jr., Knoxville, Tennessee for the Appellants, The IJ Company, Inc. and Reinhart Foodservice, LLC.

D. Scott Hurley and Anna R. East, Knoxville, Tennessee for the Appellee, Collier Development Company, Inc.

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[1] IJ was purchased by Reinhart Foodservice, LLC during the pendency of this suit and Reinhart Foodservice LLC was granted leave to intervene in the proceedings as an additional plaintiff.

OPINION

Background

IJ began supplying food service products to Rocky River when Rocky River first opened for business in Pigeon Forge in 1998. Rocky River was formed as an LLC by a group of investors comprised of Phillip Don Collier, Kay Collier Pittman, Clarence Mabe, Britton Mabe, Gary Sanders, and Bobby Hill. John Pittman, Kay Collier Pittman's husband, was added later as an additional owner. Phillip Don Collier and Kay Collier Pittman are members of the Collier family. The Collier family is involved in a number of businesses in Sevier County, some of which have contracts with IJ for food service products delivery.

Initially, Rocky River paid its invoices to IJ in a timely manner. However, at some point, Rocky River became delinquent, and, eventually, Rocky River failed. IJ then sued Collier Development seeking payment from Collier Development for the Rocky River debt owed to IJ. The case proceeded to trial in November of 2008.

At trial, the parties stipulated to the following facts:

1. Mike Clark was the manager of Rocky River Brewery and Grill.
2. In early May 1998, Clark obtained an IJ Credit Application Form from IJ.
3. Clark filed in the upper portion of the form, under the heading "Ship To". He entered the words "Collier Development Co./DBA/Rocky River Brewery & Grille". Then, after conferring with Don Collier, he marked through the words "Collier Development Co./DBA..."
4. Clark also entered the street address, city, state and zip code in the "ship to" section of the form.
5. Clark did not mark through the words "Rocky River Brewery & Grille" in the "Bill To" section of the application, nor did he write in the words "Collier Development Co." or any of the other information in the "Bill To" section of the form.
6. Mike Clark did not complete or fill in or sign any other portion of the form.

* * *

The signature appearing on the second page of the IJ credit application in the box identified as "Terms of Sale Agreement" below the handwritten "Rocky River Brewery & Grill" and above "V-P" is the signature of Elizabeth Kay Collier Pittman in ink. Ms. Pittman also wrote "V-P" underneath her signature.

Ms. Pittman's signature is over the top of the pencil written words "Rocky River Brewery & Grill".

Donald Ray Collins, II, the former director of financial services for IJ, testified at trial. Mr. Collins was responsible for IJ's credit department during the relevant time period involved

in this suit. He worked for IJ from 1997 through 2004, or 2005. Mr. Collins explained that Darlene Gourley was the credit analyst in his department who handled the Rocky River account.

Mr. Collins explained that IJ was a food service products distributor for Collier Development, and that IJ had been doing business with Collier Development before Mr. Collins started working for IJ. Mr. Collins testified that IJ and "[t]he Colliers have and had a strong relationship. I mean, they're a big name in the Sevierville, Pigeon Forge area, a lot of businesses, a lot of money, big customer."

Mr. Collins received the credit application ("Credit Application") at issue in this case from IJ's salesperson, Mike Brown. Based upon the Credit Application, Mr. Collins understood the customer to be Collier Development. He stated:

> As far as the way that this looks, I mean, I do remember, and not on necessarily this specific customer but on several customers, many customers, salespeople will sometimes put the wrong name in the wrong place. In this case it looks like he had - - and this would have been Mike Brown, the salesperson, put - - he just made it backwards. Bill to and ship to, he had the wrong names in the wrong places. That's why he marked them out and redid them.

Mr. Collins testified that it was common for the IJ salesperson to fill out or make changes to a credit application. He also agreed that it was possible that the salesperson could make changes to a credit application after a customer executed it.

Mr. Collins explained that IJ was billing Collier Development and that the invoices went with the food delivery to the restaurant. For a period of time the Rocky River bills were paid, but eventually the account became delinquent. Mr. Collins testified that the Credit Application was filled out in approximately 1998 and problems "really came to a head in 2001…."

Mr. Collins testified that when the account "became more and more delinquent," he:

> Began discussing with sales management and the management of I.J., but specifically sales management, the salesperson, just to try to get a better understanding at that time who we were doing business with. I thought, and my staff believed that, you know, we needed to do something as far as possibly change their terms, try to get them closer to being in terms.

Mr. Collins stated that at some point the sales management suggested that they meet with the customer. Mr. Collins testified:

> it's not unusual in food service or in any industry, I guess, for the salesperson to want the credit person to feel more comfortable with the customer. So sales management said, well, let's set up some meetings, we'll go meet with Don so you can feel better about it so that we don't cut them off. So we began meeting with him about once a month, I believe. We would drive up to Pigeon Forge and meet with Don [Collier].

An e-mail introduced at trial from Mr. Collins to Ted McCloud, IJ's district sales manager, dated December 21, 2000 stated:

> What is your plan to bring this account current? The exposure has not improved and the delinquency is still dangerously high. I realize that the owners are related to the Collier group, but the Collier group has made it clear that they are not responsible for this money. I live less than a mile from the location. They do not have much business, and I am concerned that the restaurant will fail. They do not appear to have kept their promises to you of being current by certain dates. I do not want to pull the plug on them, but if they cannot give us a firm date and a plan of how they will get current and stay current, then I will be forced to recommend action. Let me know.

Another e-mail introduced at trial from Darlene Gourley, IJ's credit analyst, to Ted McCloud and Mike Brown dated October 2, 2001 stated:

> The Rocky River account is past due $99,723.52. It is my understanding from Mike that the partners at Rocky River are no longer going to help in paying towards this account and the owner is trying to come up with money to pay the account up before the end of fall. Mike also talked to the a/p person while in my office today and they told him they would be trying to pay about 35k by this Friday but this is a [sic] not close to what they have past due. I'm not sure if there is resolution on our side to recoup what is owed but I think it is a very good time to try. Please advise. My advice would be DCX with a payback arrangement, especially now that the owner has no financial backing.

Sometime after one of the meetings with Don Collier, Mr. Collins wrote a holiday letter to Don Collier. In pertinent part, this undated holiday letter stated:

> I hope you and your family had a great holiday season. On behalf of the IJ Credit Department and The IJ Company as a whole, I want to thank you for your continued patronage. I also wanted to thank you specifically for our last meeting before Christmas. When Ted McCloud and I visited this last time, I will admit that I was very concerned about the large exposure of the Rocky River Brewery account. At that time, you made a promise that neither you nor your family would allow IJ to lose money as a Rocky River supplier. Obviously, as the Credit Manager I have heard this before from other customers who have eventually become debtors. However, because of the tremendous reputation that you and your family have established using fair business practices, I believe that you are true to your word. During that meeting, we also discussed a Promissory Note with Personal Guaranties from each principle associated with the Rocky River Brewery and Grill. Based on my notes from that meeting, you agreed to have this account current no later than April 30, 2002. Since the time of the December meeting the balance has risen quite a bit. I know that you are doing what you can to keep the balance down, but please try to keep the balance under $150,000.00 if possible. I have enclosed two copies of the Promissory Note (1 copy to be signed, notarized and returned to my attention at IJ at the below listed

> address and one copy for your records). I have also enclosed two copies of each Personal Guaranty. Each Guaranty is personalized based on the names that you gave me. Each Guaranty should be signed, notarized, and returned to my attention at IJ at the below listed address. I trust that you will help get these signed documents returned to IJ by no later than February 20, 2002. Again, thank you for your business.

The personal guaranties enclosed with the holiday letter were in the names of John Pittman, Don Collier, Kaye Collier Pittman, Gary Sanders, Rick Mabe, and Clarence Mabe. The promissory note and these personal guaranties never were signed.

Mr. Collins testified:

> The meeting before the holidays there was really - - we - - we were told that we weren't going to lose money, so we decided that we would continue to sell to them. The last meeting that we had with Mr. Collier we were told that he was no longer the - - the managing member, whatever, I forget the exact wording he used, but that he was no longer in charge, that he was no longer able to make decisions, he had basically been kicked out. And he - - I asked him about, you know, what about our guarantee that we would not lose a penny on this, because those were his words, and he said he couldn't back that up anymore. He said that he would not be able to - - to promise that we weren't going to lose our money. From that meeting I went back and notified sales, notified management, CFO, president, and we ended up having to put them on C.O.D., cash on delivery, cash or check, I think. And that's pretty standard once you find out that the person that said they were going to pay for the - - the groceries isn't going to pay for it. You do everything you can at that point to try to get as much money as you can and not make the debt worse.

IJ put Rocky River on C.O.D. in April of 2002. IJ did continue to ship to Rocky River on a C.O.D. basis for a period of time until Rocky River closed. Mr. Collins could not remember the date on which Mr. Collier last told him that he would pay the debt, but he stated it "would have been after February. It would have been after the - - the personal guaranties that I drew up, though."

Mr. Collins admitted that Mr. Collier never told him that Collier Development owned Rocky River. Mr. Collins assumed that Collier Development owned Rocky River based upon "the credit application plus, I mean, we were doing business - - this is normal even to this day in food service. You're - - you're doing business with a relationship or a reputation, and that's what we were doing business with. I mean, we were doing business with the Collier family." Mr. Collins admitted that he understood that the Collier family had multiple business entities and that Collier Development was only one of their corporations. When asked if Don Collier ever told him that Collier Development was responsible for paying for the Rocky River account, Mr. Collins stated: "He said that the Collier family would make sure that we didn't get - - … - - that we didn't lose a penny." Mr. Collins admitted that he never asked who Mr. Collier was referring to as the Collier family. Mr. Collins also admitted that although he sought personal guaranties, from Don Collier,

Kay Collier Pittman, John Pittman, Gary Sanders, Rick Mead, and Clarence Mead, he never sought a guaranty of any kind from Collier Development.

Mr. Collins admitted that the only document IJ has that makes any reference to Collier Development being liable for the Rocky River debt is the Credit Application. He stated: "Everything else was verbal." Mr. Collins is not aware of any demand made by IJ to Collier Development notifying Collier Development that it was liable for the Rocky River debt.

Tillman J. Keller, III, the chief executive officer of the Keller Group, which oversees a number of companies including IJ, testified at trial. Mr. Keller testified that IJ was sold recently to Reinhart Foodservice, LLC ("Reinhart"). The purchase agreement between Reinhart and IJ included a provision that if the accounts due were not collected within a certain amount of time, IJ was required to buy back the debt. Mr. Keller described that in food service distribution the customers "eat up your collateral.... You don't have anything. You got to depend on the credit worthiness of your customer to get paid. There's nothing to go and get." Mr. Keller stated that up until these proceedings, IJ had always had a good relationship with the Colliers and Collier Development.

James T. McCloud, IJ's district sales manager, also testified at trial. IJ has done business with various restaurants that the Colliers are involved with over the years including six to eight motels, Country Kitchen, Corky's BBQ, and two Golden Corrals. Mr. McCloud assumed that the Collier family and Collier Development owned Rocky River, but never asked about this. Mr. McCloud testified that at one point, Mr. Collier told him that as long as Mr. Collier was involved, IJ would not lose any money. Mr. McCloud testified that he assumed that Collier Development was involved with Rocky River: "Until I found out, I guess when I started reading the documents, that it wasn't." When dealing with Don Collier, Mr. McCloud found him to be "very responsive," open and forthcoming, and truthful.

Gregory D. Bostick, the corporate manager of credit and accounts receivable for IJ at the time of trial, testified. At the time of trial, Mr. Bostick had been employed by IJ or Reinhart for approximately one year. Mr. Bostick testified that the outstanding balance of the debt being sued for, excluding interest, is $240,750.36, and that with interest the total is $479,093.19. The entire debt being sued for was incurred in November of 2001 or later.

Phillip Don Collier testified that Rocky River opened for business in June of 1998. Mr. Collier explained: "The owners and operators [of Rocky River] was going to be a group of investors that was composed of myself, my sister, Clarence Mabe, Britton Mabe, Gary Sanders, and Bobby Hill." John Pittman, Kay Collier Pittman's husband, was added later as an owner. Mr. Collier further explained: "Through the architectural phase of [Rocky River] I was calling the shots, but then the - - we had another situation arise, and I had to pull off of. At that point I offered part of my ownership to Mr. Pittman to take over and get the restaurant going, and he hired Mr. [Mike] Clark as the manager."

Collier Development never owned any interest in Rocky River. Mr. Collier testified that he never told anyone that Collier Development owned an interest in Rocky River. Mr. Collier

first became aware that IJ was looking to Collier Development to pay the Rocky River debt when this lawsuit was filed. Prior to that time, he had received no written communications from IJ that even suggested that IJ took the position that Collier Development owed the money, and no IJ representatives ever had told him verbally that they took the position that Collier Development was liable for the Rocky River debt. Mr. Collier testified that at a meeting he had with IJ representatives in August of 2001, Mr. Collins asked if Mr. Collier could get the money from Collier and Mr. Collier "assumed he was talking in the lines of a loan, get a loan from Collier." Mr. Collier responded by telling Mr. Collins "that Collier Development had no ownership interest in Rocky River and that they would not advance any money because it was not a Collier project." Mr. Collier testified that Mr. Collins did not show any surprise or disagreement with that statement. Mr. Collins then pulled some documents out of a briefcase and asked Mr. Collier to sign a personal guaranty, but Mr. Collier refused to sign.

Mr. Collier admitted that he made the statement to IJ that as long as he was running Rocky River, IJ would be paid and would not lose any money. However, he never made any promise or commitment that Collier Development would make any payment on behalf of Rocky River. Mr. Collier explained:

> [I]n 1998 Collier Development Company spun off into three separate companies, and my brother Brent took all the restaurants, my sister and I and my mother took the hotels and one restaurant that was in a hotel, and then my older brother, Steve, took the construction company, the campground, and a cabin project and vacant land. And we all swapped stock amongst ourselves in this reorganization so that we were three independent companies. And from 1998 forward I could not have made any representation to anyone that I spoke for the entire Collier family because that was no longer true regardless of my capacity at Collier Development Company.

Although payment on the Rocky River account typically was made to IJ on Rocky River Grill checks, Mr. Collier explained why IJ received a single check from Collier Development in payment of some Rocky River debt stating:

> When I started diverting the bank payments from the bank to I.J. to pay their bill down the bank drafted the account for the payments.… Rocky River Grill's account. And it's in the loan documents that they've got the right to go into that bank account for any unpaid balance. When they did that, the checks bounced. We weren't notified by the bank they were doing it, so our payroll checks and the other vendor checks were bouncing. And I informed the Mabes of this, and we decided that we could not manage the account if the bank was not going to notify us when they drafted the account, and, therefore, we needed to set up another account.
>
> And so BB&T was selected for the new bank account, and the monies, the new monies coming in from sales, were put into that account. During this time frame we normally - - bills are normally paid once a week. At the time, there were no checks on the BB&T account other than the starter kit. And so Collier Development made one payable section for that week on their checks, and one of those checks was

to I.J. for fourteen thousand and change. And then Rocky River wrote Collier a check covering those - - that vendor list of about twenty-eight thousand dollars.

Mr. Collier stated that he has had problems with IJ listing the wrong party, Collier Development, on the "bill to" section of documents for a number of his businesses including Mountain Valley Vineyards, Apple Barn, and Lazer Port. Although Mr. Collier has told IJ multiple times that they were incorrectly listing Collier Development, IJ continues to list Collier Development on those documents.

After trial, the Trial Court entered its Final Judgment on December 10, 2008 incorporating the Trial Court's Memorandum Opinion by reference. In the detailed Memorandum Opinion, the Trial Court found and held, *inter alia*:

> We're here in the case which we were in an all day trial last Monday, … where the original plaintiff, IJ Company, sued the defendant corporation, Collier Development Company, for arrearages in this account which was under the name of Rocky River Brewery and Grill. Of course, IJ has now been acquired by this Reinhart Food Service, but that makes no difference in this case.
>
> [IJ] at that time, of course, was engaged in food services, that's what is important to this, and its relationship with this particular restaurant began back in '98 when this combination restaurant and brewery was started up in Pigeon Forge.
>
> [IJ] relies on what was introduced as Exhibit 1 entitled Credit Application. After that Exhibit 1 was presented to [IJ], this account was established and goods were routinely delivered to the restaurant. And for a time everything, of course, went well, and the account was current, and then delinquencies began to develop. The restaurant got behind and further and further behind, and by 2001 these delinquencies became significant. We had these copies of e-mails that showed internal discussions among [IJ's] personnel in an effort to determine what cause of action [IJ] should take with relationship to this particular account. Eventually, they arranged meetings with Don Collier, who was the principal both in [Collier Development] and [Rocky River]. After a time, Mr. Collier informed [IJ] that the problem was that the non-Collier family members of this restaurant group were not doing as they should to support the business and the business itself wasn't doing well. He then assured [IJ] that it would not lose any money and would be protected so long as he was involved in the restaurant. Finally, of course, he informed [IJ] that he was no longer a part of this restaurant group, he had been kicked out himself, and to protect itself, [IJ] should then put the restaurant on a cash basis, cash on delivery basis. The restaurant then, of course, failed as we've heard, and there was a significant sum owed to [IJ]. The total amount of the debt plus interest has been stipulated in this particular case.
>
> As I said, the basis for [IJ's] claim is what was introduced as Exhibit 1, which consist[s] of these pieces of paper entitled Credit Application. These are dated back in May of 1998. Now, the Credit Application itself on the first part is headed, "ship

to." As we've discussed several times, it then contains the words "Collier Development Company, d/b/a Rocky River Brewery and Grill," and the Rocky River Brewery and Grill part was left, and the Collier Development Company, d/b/a was marked out. It's been stipulated in this trial that Mike Clark, who was going to act as manager of the restaurant, obtained this form and marked out these words, "Collier Development Company, d/b/a." The Court notes that this form itself underneath that particular blank called for that blank to list the legal name of the entity owning the business and the trade name, if any, then gave an example. For example, "A Company, d/b/a." So in this very first line then the words again were Collier Development Company, d/b/a, but the Collier Development Company, d/b/a was marked out.

Then the next blank was the "bill to" line, and in that line Rocky River Brewery and Grill was marked out and Collier Development Company was written in by somebody. The instructions as to that particular blank called for the party legally responsible for payment and then notes that that should be the same as the customer and then calls for an explanation if that was not true. And the explanation blank, of course, was left blank and not filled in. Unlike some of these other credit applications that were shown to the Court, there was no personal guaranty filled out in this particular credit application. No one signed that personally guaranteeing it.

Under the section entitled, "terms of sale agreement," there's a blank entitled, "customer," and that line, as we noted several times, in pencil was marked in Rocky River Brewery and Grill. And then underneath that there was a line marked, "by," b - y, and that was signed Katie Collier-Pittman, and then the next line was marked, "title," and it was marked, "VP." This portion of the form is also different from all the other examples that were introduced as examples of other times where the defendant corporation and the members of the Collier family had done business with [IJ] in that this particular form has that line that says "customer." The other ones don't have that. But here, the customer is marked Rocky River Brewery and Grill. This Kaye Collier-Pittman was shown by the proof to have been both a shareholder of [Collier Development] and a member of the restaurant group.

So as I said, the billings are made to the Collier Development Company at the Post Office Box, Box 648 in Pigeon Forge, which was the corporate post office box. Mr. Collier testified that the corporation was involved with a number of various businesses, and it was the corporate practice that all the billings would be sent to this same post office box where then the billings would be collected and dealt with as appropriate. Payments on this account the proof shows, were made usually on checks imprinted with the restaurant name. While Mr. Collier testified that the corporation often had to correct suppliers, including [IJ], for incorrect billings, there were no complaints conveyed to [IJ] about these particular billings.

Now, as far as the relationship between [IJ] and [Collier Development], witnesses for [IJ], including Mr. Keller, who was over all the business there,

emphasized that the nature of this restaurant supply business made trust between the parties of the utmost importance. As Mr. Keller said, "They eat up your collateral." In other words, unlike many businesses, there is no collateral for the vendor here because it either spoils or it is eaten up, so trust in this type of business is more important than in many other types of businesses.

So the plaintiff's representatives repeatedly spoke of the personal relationship between [IJ] and the Collier family. Mr. Collins, who testified for [IJ], said that he considered the Collier family and [Collier Development] one and the same. So when problems developed in 2001 and they had these meetings between representatives of [IJ] and Mr. Don Collier, it was his assurances that basically satisfied [IJ]. Eventually, and apparently in August of 2001 he told them that there was a separate organization, the restaurant was separate from the corporation but assured them that as long as he was involved with the restaurant they would not lose any money.

And a significant factor in how this account was handled by [IJ] appears to be the longstanding relationship between [IJ] and the Collier family, which did a great deal of business through many, many enterprises, hotels, motels, all sorts of different enterprises that the Collier family was connected to and ran. So as noted in one of the e-mails that was presented to the Court, I quote from that e-mail, [IJ's] representatives considered, and according to this account, to be political. So the employees of [IJ] seemed somewhat reluctant to press [Collier Development] or any member of the Collier family for payment because of fear that maybe they would just take all of their business away from [IJ], which complicated this situation, especially as far as [IJ] is concerned. So therefore, no direct demands on [Collier Development] were ever made.

So the proof is that after August 2001 the representatives of [IJ] and [IJ] basically accepted that [Collier Development] was not the responsible party and relied upon the assurances of Mr. Collier. And as stated in this, what we referred to as the "holiday letter" - - and here, I must say I'm not sure what Mr. Morton's Brief means here because he says that it's clear from the letter that they were looking to the corporation, [Collier Development], as being the responsible party. But unless we accept the fact that they looked at the corporation and the family as one and the same, which I'm not sure legally we can do, the letter, it says, "When Ted McCloud and I visited this last time, I will admit I was very concerned about the large exposure of the Rocky River Brewery account. At that time, you made a promise that neither you nor your family would allow us" - - let me start again. "Neither you nor your family would allow IJ to lose money as a Rocky River supplier." So here again, they're looking to the assurances of Mr. Collier. And that was apparently the situation. And so he finally said, look, I'm out now, you better put these people on a cash basis. And, of course, then it failed.

As we've noted, all the stipulated amounts that are due and owing were incurred after the time that Mr. Collier told them and made it clear that in his opinion

the corporation had no responsibility in this. Again, they apparently accepted this and were looking to him and his assurances rather than assurances of the corporation. Again, going back to this "holiday letter," the corporation is not mentioned. They asked for personal guaranties for the principals in the restaurant business, things which would not be necessary had they felt that the corporation itself was the liable party.

So going back to where we started with Exhibit 1, again, this writing presents significant problems for the position taken by [IJ] in this case, especially in the very first line, the line that says "customer," and the instructions under which say the actual owner of the entity, and that is marked out. And the proof is, stipulated proof is, that that was marked out by the then potential manager of the place. That certainly has to raise a question about what this exactly means. It's obvious that these people, like many businesses, just sort of went along hoping everything would work out, but they didn't, and that's what happens in these types of situations. You know, if we did it over again, I'm sure that they would have a personal guaranty from Mr. Collier or somebody else or Kaye Collier, somebody on that line. That wasn't done. It's just not clear.

But in any event, after they were faced with these problems and discussed this with Mr. Collier and he said, look, the corporation is not involved in this business, and they pretty much accepted that. And all the sued for indebtedness occurred after that. It's very difficult for [IJ] to prevail against this corporation.

This, obviously, is completely backwards from the normal type of situation where we try to ignore a corporation and impose liability on an individual, as was done in that case you gave to me, which I want to talk about aside from this later on. But this isn't this. This case, we're trying to impose liability on a corporation, and it's not clear, first of all, from the documents that the corporation indicated an intention to be bound by this, or that when confronted with this position of Mr. Collier that [IJ] did anything other than acquiesce in the corporation's position, which was that the corporation was completely separate from this restaurant and was not responsible.

So for those reasons, the Court directs you to prepare an order indicating judgment in this case be for [Collier Development].

IJ appeals to this Court.

Discussion

Although it is difficult to tell from its briefs on appeal, IJ raises one issue on appeal: whether the Trial Court erred in holding that a contract did not exist between IJ and Collier Development.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

As noted by our Supreme Court in *Doe v. HCA Health Services of Tennessee, Inc.*:

> A contract "'must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from fraud or undue influence, not against public policy and sufficiently definite to be enforced.'" *Higgins v. Oil, Chem., and Atomic Workers Int'l Union, Local # 3-677*, 811 S.W.2d 875, 879 (Tenn. 1991) (quoting *Johnson v. Central Nat'l Ins. Co. of Omaha,* 210 Tenn. 24, 34-35, 356 S.W.2d 277, 281 (Tenn. 1962) (citations omitted)). Indefiniteness regarding an essential element of a contract "may prevent the creation of an enforceable contract." *Jamestowne On Signal, Inc. v. First Fed. Sav. & Loan Ass'n*, 807 S.W.2d 559, 565 (Tenn. Ct. App. 1990) (citing *Hansen v. Snell*, 11 Utah 2d 64, 354 P.2d 1070 (1960)). A contract "'must be of sufficient explicitness so that a court can perceive what are the respective obligations of the parties.'" *Higgins*, 811 S.W.2d at 880 (quoting *Soar v. National Football League Players' Ass'n*, 550 F.2d 1287, 1290 (1st Cir. 1977)); *see also Restatement (Second) of Contracts* § 33(2) (1981) ("The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.")

Doe v. HCA Health Services of Tennessee, Inc., 46 S.W.3d 191, 196 (Tenn. 2001). Without any "meeting of the minds of the parties in mutual assent to the terms. . .," there can be no enforceable contract. *Id.* "Parol evidence is ordinarily admissible to establish the identities of the parties to a contract or other legal instrument." *Int'l House of Talent, Inc. v. Alabama*, 712 S.W.2d 78, 86 (Tenn. 1986).

The Credit Application introduced at trial contains several different styles of handwriting, was completed using several different types of writing instruments, and contains sections where words were written and then crossed out. It is clear from reading the Credit Application that it, at best, is ambiguous with regard to who the parties to the contract are. The Trial Court considered all the evidence and found that IJ had not satisfied its burden to show that Collier Development ever had indicated an intent to be bound by this contract. In short, the Trial Court determined that IJ failed to prove that Collier Development ever was a party to this contract. The evidence does not preponderate against this finding.

Furthermore, even if the Trial Court and now this Court are incorrect in determining that IJ never was a party to this contract, after the August 2001 meeting between IJ representatives and Don Collier, IJ clearly was on notice and accepted that Collier Development did not intend be bound by this contract. As this Court has stated:

> Perhaps the proposition is so well known that it should be judicially noticed, but the authorities with which we are familiar say that contracts for an indefinite duration are generally terminable at will be either party with reasonable notice.… Even a continuing contract may be terminated by one party if the other party assents.… What the cases call a mutual rescission may be effected by acts and conduct that are positive, unequivocal, and inconsistent with the contract's existence.

McReynolds v. Cherokee Ins. Co., 896 S.W2d 777, 779-80 (Tenn. Ct. App. 1994) (italics in original omitted) (citations omitted).

The evidence shows, as found by the Trial Court, that during the August 2001 meeting, Mr. Collier clearly informed IJ that Collier Development was not a party to the Rocky River contract. The evidence shows, as demonstrated both by testimony and by the e-mails and letters introduced at trial, that IJ accepted that Collier Development was not the responsible party. The evidence does not preponderate against these findings by the Trial Court. As such, even if Collier Development originally had been a party to the Credit Application, after August 2001 Collier Development had given IJ reasonable notice of terminating the contract. Given all this, we find no error in the Trial Court's December 10, 2008 order and judgment.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellants, The IJ Company, Inc. and Reinhart Foodservice, LLC, and their surety.

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D. MICHAEL SWINEY, JUDGE